BEFORE THE UTAH WATER QUALITY BOARD

DEPARTMENT OF ENVIRONMENTAL QUALITY

IN THE MATTER OF U.S. OIL SANDS
PR SPRING TAR SANDS PROJECT No. WQ PR-11-001
GROUND WATER DISCHARGE PERMIT-
BY-RULE

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HEARING PROCEEDINGS

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LOCATION:	Department of Environmental Quality 195 North 1950 West Salt Lake City, Utah
DATE:	Wednesday, October 24, 2012
TIME:	9:54 a.m.
REPORTED BY:	Scott M. Knight, RPR

APPEARANCES

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STEVEN P. SIMPSON, VICE CHAIR
MYRON E. BATEMAN
CLYDE L. BUNKER
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Hearing Proceedings

October 24, 2012

PROCEEDINGS

MS. McEWAN: I'm Kim McEwan. And I will be representing the Water Quality Board in this matter. The next Water Quality Board agenda item is in the matter of U.S. Oil Sands Tar Sands Project Ground Water Discharge Permit-By-Rule, No. WQ PR-11-001. The parties and their representatives in this proceeding are the executive secretary, represented by Assistant Attorney General Paul McConkie; Living Rivers, represented by Rob Dubuc and Joro Walker; and U.S. Oil Sands, represented by Chris Hogle and Benjamin Machlis. As I stated earlier, the Board is represented by Assistant Attorney General Kimberlee McEwan.

Board members have received a copy of the administrative law judge's memorandum, findings of fact, conclusions of law and recommended order dated August 28, 2012. In addition, Board members have received a CD of the administrative record of the adjudicative proceeding before the administrative law judge. The ALJ issued the memorandum and recommended order after a two-day

evidentiary hearing held in May of 2012.

The purpose of this agenda item is for the Board to hear oral argument from the parties and to determine whether to approve of modifications, to--or to disapprove ALJ's memorandum and recommended order or to remand the matter back to the ALJ with further actions as directed by the Board. I wish to emphasize that this is a judicial proceeding. As such, only parties will be allowed to address the Board. Board members may ask questions of any party but will not take comments from any members of the public. The Board is performing a judicial function and must rely solely on the record and the oral arguments in arriving at its decision. The parties may refer to evidence already in the record and may give legal arguments in response to questions.

The parties will have 15 minutes as timed by the staff to address the Board. The order of presentation will be as follows: Mr. McConkie for the executive secretary, Mr. Dubuc and/or Ms. Walker for Living Rivers, and Mr. Hogle and/or Mr. Machlis for U.S. Oil Sands. Following oral argument, there will be discussion among Board

members. And following that discussion, the Chair will entertain discussions. Following Board action, Counsel for the Board will draft an order memorializing the Board's decision and the parties' procedural rights.

I note to Board members in making a motion--I know we'll be bringing this up later--but specify in the motion whether you want to approve or disapprove all or part of the recommended decision, of the recommended order, and identify relevant parts. That can be complicated. And we'll talk about that later when we get to that point.

And if there aren't any questions just about procedure--and if not, we will just turn the time over to Mr. McConkie.

MS. DOUGHTY: Do we have a clock?

UNIDENTIFIED SPEAKER: We have a timer over there.

MS. DOUGHTY: We have a timer over there. Okay. So, each representative will be given 15 minutes. And in between we'll be taking a few comments from Board members, if there are any.

MR. McCONKIE: Ladies and gentlemen of the Board, good morning. Thank you for being here

today. This is obviously a matter of substantial interest. And I appreciate the seriousness that the Board--I know the Board takes responsibilities very seriously.

MS. DOUGHTY: Mr. McConkie, sorry to jump in. It's hard to hear you. And I know that cordless mike is a little louder. I don't know if you want to use that.

MR. McCONKIE: That might be better.

On March 4, the executive secretary determined that a tar sands mining project in the Uinta Basin qualified for permit-by-rule status under Utah Administrative Code R317-6-6.2(A)(25) based on the de minimis potential effect on ground water quality. On May--on February 15, 2011, the executive secretary determined that the proposed changes to the tar sands mining project did not warrant modification under revocation of the 2008 decision. Petitioner filed a challenge to the 2011 modification decision. An administrative law judge was assigned and two-day--as Ms. McEwan stated, a two-day hearing was held on May 17, 2012. And then pursuant to rule, the administrative law judge prepared a recommended decision that includes written findings of fact and conclusions of law.

Now, you as the Board are the final decision maker on this. The--in its request for agency action, the release that Living Rivers was asking for was that the permit-by- rule be remanded and that DWQ should require a ground water permit application be filed under 317-6-6.3. Any time request like that is--or relief like that is requested, we need to look at the factual and regulatory basis to remand the permit-by-rule.

I'm just going to put up the rules, the administrative rules, which govern this particular administrative action. The first one is R317-6-6.1, which basically states that a facility that's modified or built needs to be permit-by-rule or it needs to have a ground water discharge permit.

The next rule--and this is a rule that this PR springs project was permitted by rule under is 6.2(A)(25), which states--it's the de minimis requirement, which states that facilities and modifications which the executive secretary determines, after review of the application, will have a de minimis actual or potential effect on ground water quality. This is the rule that the executive secretary based the current rule on.

And then we have R317-6.1(c), which is the rule that basically states that the executive secretary may require a permit by rule facility to--at any time to submit a ground water discharge permit application if it meets certain criteria, if there's a reason to do so.

And so basically, the question I'd ask the Board to keep in mind throughout this whole thing is what would be the factual and regulatory basis to remand this permit-by-rule, and also what would be the purpose of remanding this permit-by-rule based upon the record.

I know that the Board has received a recommended decision. You know, the ALJ in this case could--after the hearing, the parties had the opportunity to submit proposed findings of fact and conclusions of law to the ALJ. And the ALJ could have done, as trial judges typically do--could have adopted findings and conclusions that she agreed with as her own, findings and conclusions as recommended decisions. The ALJ didn't do that in this case.

Instead, what she did was she made us wait over three months for the decision as she went through the record, applying the facts to the law.

And so what the Board has now is a very detailed 40-page decision where the ALJ went through and cited the record and cited her analysis and came up with findings of fact and conclusions of law.

One of the real benefits of the recommended decision in this case is that the ALJ didn't just put findings of fact and conclusions of law and then just cite the record. The ALJ included her analysis. And I think that's very helpful to the Board, because the Board can go back and review that and see how the executive--how the ALJ arrived at her conclusions.

Okay. One of the questions in this case is: What's the record and what is the record that the Board should consider? One of the contentions that Living Rivers is making is that the Board should be limited to just reviewing the record that the executive--the secretary had before him at the time he made the decision. Well, that's not the record in this case.

The final agency record is defined by rule. And that's in R305-6-208: The agency record shall consist of an initial order and also an adjudicative record. And as you can see, the rule--it defines the initial record. And if we

went to R305-6-208(2), you would see what consists of the initial record, which is essentially what the executive secretary had before him at the time he made his decision. And then he had the adjudicative record. And that's all discovery we went through, litigation, putting on witnesses, taking evidence.

Early on in this process the ALJ determined that the petitioner was entitled to a trial-type proceeding. And that would include evidence not only of those acts that we're recording that the executive secretary had at the time he made his determination. It's important for what the Board is being asked to do in this case to have all the relevant evidence, because you're the fact finder. You're determining whether this facility out there in the Uinta Basin should be permitted by rule or whether it should be required to have a ground water discharge permit.

Mark Novak testified--one of the things that Living Rivers is saying--that the Division should have required a permit discharge or an application for a ground water discharge permit. Mark Novak testified that the application submitted by the company was equivalent of what the rules

would require in a ground water discharge permit application. And we spent a lot of time with Mark on the witness stand going through each one of those requirements, what would have been required had there been a discharge permit application.

The only thing that wasn't included in that was ground water sampling, because ground water couldn't be located to sample. Mark Novak and Rob Herbert from the Ground Water Protection Section testified that the regulatory choice that they were facing was either issue a permit-by-rule or require a ground water discharge permit. The common theme in their testimony was, in order to have ground water discharge--in order to have a ground water discharge permit, you need to have monitoring points. And so they were out there looking for ground water. And the record is full of all the evidence and all the efforts that were made to locate ground water so they could determine whether or not there could even be a ground water discharge permit.

In their request for agency action, Living Rivers stated that because it is not supported by evidence in the record or otherwise, DWQ's permit-by-rule decision is arbitrary,

capricious, and contrary to agency rule. Well, you can look at the record and make your own decision about whether or not the determination was arbitrary, capricious, and contrary to agency rule. Right there, Living Rivers is basically stating what the standard is. And the standard is evidence in the record or otherwise. Now they're trying to limit that and kind of take that "otherwise" out of it. And I suppose what they're referring to there is the initial record.

The standard review in this case is whether the executive secretary--whether this is supported by substantial evidence when viewed in light of the whole record.

Okay. This is the mine site (indicating). This shows what it looks like out there in Uintah County. You can see--basically the affected area of the project will consist of 213 acres leased from SITLA lands. The project will consist of open pit mining and tar sands, extraction of bitumen using a citrus-based d-limonene and storage of processed sands, processed fines, and waste rock in the mine. And the area--the additional storage areas will total 70 acres in size. That kind of gives you an idea

of what we're looking at out there.

Okay. In 2011, Living Rivers went out and did a drilling project. Now, this drilling project was referenced in 2008 demonstration. It was something that they had committed to do--to do even additional investigation for ground water, because they were out there looking for ground water. This is something that Living Rivers wants to keep out, because they say this wasn't before the executive secretary when he made his determination. The ALJ found this to be very persuasive, because basically it really shows exactly what we have. And it confirms everything that they found out there when they couldn't find ground water.

What this shows is that there were 180 holes in and around the mine site with a dense grid of 55 holes within the project area up to 305 feet in depth, which is more than twice the depth to which U.S. Oil Sands will mine. So, it basically Swiss cheesed the actual project area with 55 holes about 400 feet apart. And they found no water. None.

They also went out and drilled five holes near the project area to depths below 1,500

feet to serve the water needs. And they found--they didn't find water until 1,830 feet.

Basically what I want to do right now is quickly buzz--I'm running out of time--I want to quickly address Living Rivers' claim that the executive secretary and the ALJ applied the wrong ground water definition. Basically what the executive secretary did is applied the ground water definition in the ground water protection rules. That's what they do. They apply the rules; and they apply the definition of ground water and aquifer in ground water protection rules.

You're going to hear a lot of testimony--or a lot of argument from Living Rivers today that they should have applied--that what we're really talking about is waters of the State--and any underground water, no matter what the quantity--even if there's a cup of water underneath the ground, it's included somehow in this permit-by-review. That's not how it works. That's not how the program works. Ground Water Protection Section, when they're asked to do a permit-by-rule review, they apply the ground--the Board's ground water protection rules. And there's a reason why ground water and aquifers aren't defined, because

the definition of waters of the State is just way too general.

And so when they're making their argument about this--and they go through this whole thing, this whole exercise, talking about waters of the State--think about whether or not this is even--this is just an academic process, an academic exercise, because there's no water. No water at all has been found, of no quantity out there. So, they can say all they want that they're not applying the right standard, but no water at all has been found.

One of the important things is that the permit-by-rule letters has this caveat language that if additional information is found, then the executive secretary will review it and determine whether or not a ground water discharge--or whether or not a ground water discharge permit needs to be required. So, these permit-by-rules--and this is very important in this case, the permit-by-rules are--this is an ongoing evaluation. And they're constantly evaluating whether or not additional--whether or not ground water is found and whether or not a permit-by-rule--or a ground water discharge permit is required.

Another point they make is with regard to--and because I'm out of time--I only have 30 seconds left--one of the things that I would ask you to do is go to the findings--go to the ALJ's findings of fact on this issue of the testing. One of the things they say is the testing was faulty. We have a certification from the lab that all of the data is acceptable as represented. So, I'd ask you to take a look at the record, also with regard to the testing--

(Timing beeper sounds.)

MR. McCONKIE: The executive secretary is going to--if I could have about ten seconds--the executive secretary is going to require the company to provide additional testing. When they produce tailings, those tailings are going to be evaluated to satisfy the Division.

MS. DOUGHTY: Thank you.

Are there any members of the Board that have any questions for Mr. McConkie?

MR. MENSEL: I was just curious. You showed a definition of ground water there--

MR. McCONKIE: Yes.

MR. MENSEL: --earlier. It did not--as I read it, it did not specify a minimum or a

limit, a lower limit. There's no amount. There's no way to say there's a limit, a lower limit. So, if you said that-- you criticized Living Rivers for saying that even a cup would count. But the fact is, I don't see why a cup wouldn't. I mean, maybe a cup is impractical and silly, but I don't see a lower limit here.

MR. McCONKIE: Well, there's not a lower limit. Basically what you have to do is you have to apply the--you have to apply these definitions and--talks about a zone of saturation and then talks about--then they go to the definition of aquifer. What they're doing into is going out there looking for aquifers. And then it talks about an aquifer being a geologic formation that contains sufficiently saturated permeable material to yield useable quantities of water to wells and springs. So, I guess we're talking about quantities, that that would be something that they would look at.

MR. MENSEL: But does the ground water discharge permit require that there be identified an aquifer or that there merely be identified ground water? Because there are two different definitions there.

MR. McCONKIE: I think permit--I think it kind of comes back to what they're looking for out there. They're looking for any ground water that they could monitor in order to administer a ground water discharge permit, especially what they're looking for--they were looking for any ground water. And if they found any ground water out there, they would have evaluated it to determine whether a ground water discharge permit needed to be required in this case. And they didn't find that.

And then when they did the 2011--when they saw the 2011 drilling results, basically what that did is it confirmed everything that they already had concluded about the site.

And they still hadn't ruled out--it's a mischaracterization of the testimony of Mr. Herbert and Mr. Novak to say that they acknowledge that there's ground water out there. Basically what they said is they can't rule it out. They can't rule out at some point in the future ground water might appear out there at that site. And that's why they relied upon this language in the permit-by-rule letter, that re-opener language, that if they ever do find any ground water, then

they'll evaluate that and determine whether or not it's appropriate for--still appropriate for permit-by-rule.

MS. DOUGHTY: Do you have a question?

MR. SIMPSON: I do.

The ALJ's report indicates that this is on an interfluve, a large area between two drainages. What are the closest drainages where water has been identified, or do you know?

MR. McCONKIE: I know that there's a well that's been identified. The PR Springs Well, which is almost a mile away. As far as a drainage--I don't know if Rob Herbert or Mark Novak are here to answer that question. I'd have to probably look in the record on that. They'd be in a better position. I'm sure they could answer that question.

But it's--but what we do know is that this site is up on the Tavaputs Plateau. And that's where the project site is. And right next to it, if you look to the--right there, kind of the bottom there (indicating), that's Main Canyon. Again, I can't answer where . . .

MR. SIMPSON: In looking at those--at that map, I was curious whether those, in fact, are

areas where ground water has been found. And, apparently, they're not.

MR. McCONKIE: I think that's right.

MR. SIMPSON: Ground water.

MS. DOUGHTY: Leland, do you have a question?

MR. MYERS: Yeah.

Going back to the definition, because it's important to me on what constitutes ground water. When I read that sentence, it means subsurface water in the zone of saturation. To me, as an engineer, my assumption is that that means you have to have water in between the particles filled in the voids. And so if you don't have free-flowing water in the voids, the presence of moist soil would not constitute ground water. Is that correct, in your interpretation?

MR. McCONKIE: I think that's correct.

MR. MYERS: So, it's the free-flowing water in the voids that would constitute ground water or water in the zone of saturation. Is that correct?

MR. McCONKIE: Yes.

MS. DOUGHTY: Thank you.

Any other questions?

Merritt?

MS. FREY: Just to be clear, so the definition we're working with here is ground water, not aquifer.

MR. McCONKIE: Well, aquifers also apply, because ground water--there needs to be an aquifer for there to be ground water. Even perched ground water is in a perched aquifer. And so I think both definitions. And I think the hydrogeologist might be better one to answer some of these technical questions. But both of these definitions were applied.

MS. FREY: I have one other question. This is slightly different. But de minimis is kind of the operative --used here. Has that ever been defined at all, de minimus?

MR. McCONKIE: Well, Mark Novak in his testimony defined de minimis as minimal or negligible. And it is-- it's kind of one of those definitions that they just like added and said--I think it's even hard to find in a dictionary, but that's a definition he applied.

MS. DOUGHTY: Did you have another question?

MR. MYERS: I just want to follow up on

that again. So, again, in the zone of saturation, I'm assuming that has a--there's a relative size to that. So, if I take a gallon of water and I pour it on the top of the soil, I will have immediate saturation at the point. But that amount of water is de minimis, I would assume, in the entire picture of the ground water system, so that it has to be--again, if ground water is to exist, there has to be widespread significance to it. It can't be just a very localized. It has to be like a perched water table rather than simply saturating one particular point.

MR. McCONKIE: Well, I'm not sure that that's right. I think they were out there looking for any ground water. They were looking for perched ground water. Sometimes perched ground water might be--you know, one of the things they ran into--and this is one of the factors they cited in their March 2008 PBR letter--they cited basically the definition of Price and Miller, that what you can expect out in this area. And then basically what that was, it was describing in this general area and that part of the Uinta Basin you might run into laterally discontinuous perched sandstone lenses. Some of that's just moisture.

Some of it you might kind of find a pocket of perched ground water. That's what they were looking for.

And I think you could run into pockets out there. And that's what the Division's looking for. They didn't even find that. If they were able to find those, I think it's something they would take a look at and apply that to their permit-by-rule determination. But I think that's the key in this case. They weren't able to find--in all the drilling that was done out there, all the searching, they were unable to find even that. All we have is this reference in Price and Miller to what it could be expected to be found out in that area of the region. And so--and that's why this is an ongoing evaluation.

MS. DOUGHTY: Okay. Thank you.

Any other questions?

MR. SIMPSON: I have a couple questions, actually. You referenced a well. And there was a well noted on the drilling map. Can you explain--let's see. Right there before R061 that indicates a well. Can you explain that? Do you want me to go point . . .

Right there (indicating).

MR. McCONKIE: That's Well Ridge. Is that where you're talking?

MR. SIMPSON: Sorry. I didn't see the ridge hiding behind R047. And this is called PR Spring. Is there a spring in the--

MR. McCONKIE: About a mile away there's--that's in a different water table.

MR. SIMPSON: Okay.

MR. McCONKIE: But it's--but there is about a mile away--is PR Spring. But that's--I don't believe that anybody's saying that PR Spring is impacted by this project.

MS. DOUGHTY: Any other questions?

Okay. Thank you, Mr. McConkie.

MR. McCONKIE: Okay.

MS. DOUGHTY: Next time for oral arguments we have Charles Dubuc. He represents Living Rivers.

Do you have a presentation or just--

MR. DUBUC: No. Could we arrange that map?

MS. DOUGHTY: A few seconds.

MR. DUBUC: Introducing evidence.

MR. MENSEL: Just a clarification.

MS. DOUGHTY: Are you ready?

MR. DUBUC: I am.

MS. DOUGHTY: Okay. Go ahead. Start the clock.

MR. DUBUC: Morning. My name is Rob Dubuc. And I represent Living Rivers in this matter. This is, I suppose, a historic occasion, because in the future the Water Quality Board, like other DEQ boards, won't be sitting in review of challenges such as this one.

At one point in time, the Board itself was tabbed with conducting hearings regarding challenges to a water quality permit. And the Board would have made its decision based on firsthand review of the evidence. In this case, that evidence was gathered for you by the ALJ. And she has presented you with her recommendation and how you should decide this challenge based on her review of that evidence. You may be wondering what type of deference you owe her order. And the answer is, you don't owe any deference. The recommended order is just that--a recommendation.

Currently, in making her recommendation, the ALJ spent a great deal of time and effort sifting through the record and analyzing the evidence and the legal briefs that have been filed.

But you have complete discretion to accept or reject that recommendation. To modify the recommendation in some way would remand the recommendation back to the ALJ for some additional work. Ultimately, the decision on what to do with the recommendation is yours and yours alone, based on a proper application of a law and to facts in this case.

You may be wondering why the ground water in the area of the mine site matters. This area at stake east of Desolation Canyon and up behind the Book Cliffs is home to many rare plants and is used by migratory wildlife species that depend on local water resources. Most visible wildlife use in the area of the mine are large populations of deer and elk that migrate through the area. The abundant wildlife in this relatively undisturbed region led to the formation of the Book Cliffs Conservation and-- Initiative, in cooperative effort by private and the government entities, to protect critical wildlife habitat in the southeast and Uinta Basin.

As a result of this initiative, the Division of Wildlife Resources has spent millions of sportsman-generated dollars to restore this

habitat. And today the Book Cliffs is considered one of the greatest big game hunting areas in the world. As in any semiarid climate, any water resource, regardless of size, is important to area wildlife.

I'd also like to thank you for taking the time and effort to sit and view this challenge. As we're all aware, there's a massive amount of evidence in the record, and working your way through all that data in preparation for making your decision has been no small task. Hopefully, my remarks this morning will make it less rather than more complicated for you. And I invite you to stop me at any time if you have questions.

In sorting through all the volumes of evidence and legal arguments that have been generated during this challenge, you're really going to have to answer two answers making your decision: Is there shallow ground water in the area of the mine? And will that ground water be impacted by contamination from the mining operation?

If you worked your way through the record chronologically from beginning to end, one of the first things you ran across was the

company's permit application. As you read that application, you saw that the company claimed that there were--are a number of seeps and springs in the area of the mine. They've even included a map of the area showing where those seeps and springs are located.

These seeps and springs are surface manifestations of saturated zones of water located beneath the surface. Because the mine site sits at the top of the watershed at 8,200 feet, the water that feeds these seeps and springs is not part of the larger regional aquifer, but consists of isolated pockets of saturation called perched aquifers.

As you read over the testimony, you might get the impression that this area of the State is completely dry. But, in fact, it gets the same amount of precipitation as Salt Lake City, about 12 inches a year. Just like Salt Lake, not every year or every season gets the same amount of precipitation. And most of the recharge of these zones of saturation occurs during spring snow melt, although we do get occasional thunderstorms during the summer months.

Really there's no question that there's

shallow ground water at the mine site. The company does put seeps and springs in its application above--here this year to Division of Oil, Gas & Mining. The consulting firm hired by the company notes their presence in internal memos. And during his testimony at the hearing, Mark Novak, the permit writer for this mine, admitted that there was shallow ground water at the mine site. And yet in spite of all this evidence, the ALJ recommends that we find that no shallow ground water exists. Why is that?

Put simply, whether or not you define that ground water exists at the mine site depends on how you define ground water. If you used the wrong definition to begin with, you'll get the wrong answer. And that's what happened here.

As you're fully aware, your decision in this matter must be based on Utah law. And so in order to come up with a proper definition of ground water, that's where we have to look. The Water Quality Act and the ground water protection regulations both state it is illegal for a person to discharge a pollutant into waters of the State, including ground water, without a permit.

And both the act and the regulations

define waters of the State as including all accumulations of ground water. So, according to Utah law, all accumulation of ground water qualifies for protection. And based on that definition, found in regulations, an accumulation of ground water is water found in some zone--excuse me--in the zone of saturation.

So, how deep does the zone of saturation have to be in order to qualify for protection under the law? In his testimony, Rob Herbert, head of the Ground Water Section, admits that a zone the size of this table (indicating) would be big enough. And while Mr. Novak admits that these zones of ground water exist at the mine site, what he claims is that it's just not practical to protect all of them. But the law does not give DWQ discretion to make that distinction. The executive secretary is required to protect all accumulations of ground water, including ground water that DWQ admits exists for a mine site.

As you review the testimony regarding ground water, it quickly becomes clear that part of the confusion is that there's no clear and consistent application of the law when it comes to how ground water is defined.

In her recommending order, the ALJ strays outside the bounds of Utah laws and using a USGS definition of ground water, which states that ground water is water, quote, under hydrostatic pressure which will flow into a well. That definition comes from testimony presented by the company at the hearing.

In their testimony, DWQ staff all looked at the map and tried to find what constituted ground water. First, they stated that had to be a usable amount of water but couldn't really define what that meant. Then, they stated that ground water had to be in some meaningful amount, with no clear idea how much that was. Finally, they said that there had to be more than a minimal amount of water in order to qualify for protection under the law, but again, with no explanation of what that consisted of.

The end result is that there's a clear lack--there's a lack of clear and precise definition--excuse me--the end result is that this lack of clear and precise definition makes it impossible for everyone, including the agency to ensure that the law is consistently complied with.

And while Mr. Novak admits several times

that there was shallow ground water present at the mine site, his explanation for why that water didn't qualify for protection was that there wasn't enough ground water to monitor and that it just isn't practical to protect all ground water in the State.

But the law doesn't give DWQ the discretion to make that distinction. The Water Quality Act requires DWQ protect all accumulations of ground water regardless of size. And the agency's actions have to conform to provisions of that statute.

The point I'm trying to make is that unless you use a definition of ground water that conforms to Utah law and unless you apply that definition in a consistent manner, you're going to get the wrong answer.

By using an incorrect definition of ground water as a basis for her recommended order, the ALJ has undermined the very foundation of that recommendation. Because of that, Living Rivers requests that the Water Quality Board remand the recommended order to the ALJ and director to examine the evidence of the record, using the definition of ground water found in the Water

Quality Act and then return and revise your recommended order to this Board for consideration.

Now, let me take a moment to talk about the company's approach to this challenge. In spite of the admissions in their application that there are seeps and springs present at the mine site, the company has spent a great deal of effort to explain away that evidence. By doing that, the company calls into question why they included this information in their application to begin with. It also places groups like Living Rivers in the impossible position of never really quite knowing what the facts in the case are.

The executive secretary's decision was based on information contained in the company's application to include claims that there are seeps and springs in the area of the mine. It was only after Living Rivers brought its challenge that the company began claiming that the seeps were not real seeps and the springs didn't exist. By not holding the company accountable for the information it submitted in its application and by allowing it to refute that information only after it appears inconvenient to obtain its permit sets a dangerous precedent for everyone and undermines the public's

ability to meaningfully participate in the permitting process.

I'd like to remind the Board that Living Rivers has requested that the company be required to obtain a ground water permit so that DWQ can monitor the impacts to this mine on local ground water. This mine is the first of a kind. It's the first commercial-scale tar sands mine in the U.S. And it's the first mine to use this process. Nobody, including DWQ and the company, really knows what the impacts from this mine will be. This is not the time or the place to rush ahead without knowing where we're going. This is the time to be conservative, to proceed cautiously, to make sure that mined tar sands in this way and in this place won't have unintended consequences on the environment.

In its attempt to quantify ground water resources in the area of the mine, the company claims it has gone well above and beyond what the regulations require. I'd like to make it clear that Living Rivers is not asking the company to drill every square foot of their mine site in an attempt to find ground water. But the fact of the matter is that holes that U.S. Oil Sands drilled

were 400 feet apart. And as DWQ and the company admit, they could easily have missed a zone of saturation the size of a football field with that spacing.

What Living Rivers has consistently asked is, as part of the permitting process, DWQ require the company to conduct an intensive seep and spring survey of the area over a reasonable period of time. And while the company argues that a seep and spring survey isn't required by statute, Living Rivers continues to offer this as a practical solution quantifying the extent of ground water at the mine site. Unless you conduct this type of survey over an extended period of time, you simply cannot account for seasonal or yearly variation of ground water.

Finally, because the ALJ agreed with the executive secretary and company that there was no ground water- entitled protection under the law at the mine site, the recommended order dealt with the question of testing on a very superficial level.

As you reviewed the testimony related to whether the waste stream from the mine contained the legal levels of pollutants, you no doubt are struck by the technical complexity of that

testimony. I know I was. But if you push all that complexity aside and boil this issue down to its essence, it's really not that difficult. There are two--aspects of the testing that was conducted that are necessary for you to understand when making your decision.

First and most importantly, all the parties agree that there are relatively and simple and inexpensive tests that should have been done on the tailings but were not. If those tests had been done, they would have answered the question whether the tailings from the mine would result in unacceptable contamination to the environment.

Second, the tests that were conducted by the company were not done correctly.

Regarding the first point, the tests that weren't done, DWQ offers no reason why they didn't require the company to go back and conduct these tests. The Division states something about the company not having actual tailings from the mine. But those tailings were never available. The company used the proxy obtained from Asphalt Ridge up near Vernal to do that testing. Living Rivers did not and does not challenge the use of that proxy. Well up to the date of the initial

testing, the company continued to run a series of internal tests on that proxy material. So, why didn't DWQ require them to run the correct set of tests? In fact, why doesn't DWQ require them to run those tests today?

In the recommended order, the ALJ accepts DWQ's argument that the company will be required to run those tests once their operation begins. And if the results reveal that a change to the permit is required, that change will be made. But you can't use results from tests that will be conducted at some point in the future in support of a permit that's issued today.

As to the evidence in the record noting that the tests that were done were done incorrectly, the company and executive secretary offered any number of reasons to try and explain away the flaws of those tests, but to no avail. The ground water quality protection regulations specifically require that, quote, all laboratory analysis of samples collected to determine compliance with these regulations shall be performed in accordance with standard procedures. Because these tests were not done in accordance with standard the procedures, they can't serve as a

basis for the executive secretary's decision and must be rejected.

In summary, we ask the Board to take one of two actions. We ask that you either remand the recommended order back to the ALJ and ask her to examine the evidence presented by the parties in light of the provisions the Water Quality Act that require the executive secretary to protect all accumulations of ground water, or we ask that you overrule her recommendation and direct the executive secretary to require the company to obtain ground water--a discharge permit for its mining operations.

I have 15 seconds left. Thank you.

MS. DOUGHTY: Thank you.

Are there any questions for Mr. Dubuc?

Yes, Leland.

MR. MYERS: Rob, you talk about the testing being faulty.

MR. DUBUC: Yes.

MR. MYERS: Can you explain that a little further? I'm not sure I understood even from the record why the testing that was used was faulty.

MR. DUBUC: There's a number of reasons

of why--and the company actually cites this in their demonstration. It goes through all of those tests. And it cites the holding times were exceeded, that there was air gaps in the top of the containers. So, they actually admit in their demonstration that there were problems with the initial testing.

MR. MYERS: Were these highly volatile fluids that we're dealing with? Is that why we're dealing with the air gaps?

MR. DUBUC: I'd have to pull out the demonstration. There's probably about three pages of data in there that--and then it goes through step by step. And it basically says why each of those tests have a problem.

MR. MYERS: Were all the results flagged by the laboratory as problems?

MR. DUBUC: There was some explanation in there that says that those were--you know, that some of those tests were--would probably give some acceptable data.

I think more to the point is that there were a number of tests that DWQ admits should have been done and weren't. Until you conduct those tests, you're not going to know if this--these

tailings are going to contaminate the environment.

MR. MYERS: Okay.

MS. DOUGHTY: Any other questions?

MR. TUCKER: What specific tests are you talking about that should have been run and weren't? I assume you're taking that from Mark Novak testimony.

MR. DUBUC: Correct.

MR. TUCKER: As I read that, what he's saying is they ran the best test available, what's the standard for the industry, and he wishes there was better tests to run, but there was no specific test that could have been run. So, that's why I'm wondering what specific tests you're talking about as an easy, quick test.

MR. DUBUC: I don't have the record in front of me, so I'm not going to try to sit there and quote what Mr. Novak said. If you read his deposition in this matter, what you'll see is that he admits that when they first started analyzing this mine, they weren't quite sure what tests they should require. I'm not sure they--still certain what tests should be required, since it's the first of a kind. So, I think he made it up as he went along, but essentially that's what happened.

And so, in hindsight, as he got the results of those tests--for instance, the test to determine the amount of salinity, that--the TDS that's in the tailings. He admits that the tests they ran were not really designed to come up with the right answer to that question, and if he had to do it over again, he would require something else.

Our point during this is, well, why didn't you just require them to do it again? And we never got a satisfactory answer for that.

MR. TUCKER: I read Mark's deposition very carefully, because that's what you're basing things on. How I read it is that there were tests that could have been run, they don't exist right now as we know them. And so he wishes there was something there and he wishes he could have run something different, but those were the standards. And that's how I read it. And so I--you keep stating that there's specific tests that the State should have run. And that's what I wondered: What are those specific tests?

MR. DUBUC: Again, I don't have the record in front of me and I'd have to refer to Mr. Novak's testimony. But he does go through the tests that, if he had to do it over again, he would have

required. And the ALJ admits that testing-- additional testing will be run on the tailings once the operation begins. And then if a modification in the permit is required, then DWQ will require that modification. So, there are additional tests that are run.

MR. TUCKER: We can agree to disagree on that, since I do a lot of this as part of my business. And I don't know a lot of other tests that are specific to do. That's why I was wondering if there was some that you specifically don't know. And I guess the second key question is that you state that he admits there's ground water there. And as I read his deposition, is--he states, Yes, the wells could have missed it, as you state, as big as a football field, but he didn't state there was. And I think that's a key differential to me, anyway. Yes, unless you drill every foot like you say you're not requiring, you may not know or until you dig a hole. But I can't see in his deposition, as I read it, that he admits that there is ground water there, so . . .

MR. DUBUC: In his testimony at the hearing, and if you--I'll refer you to our post-hearing briefing, there are specific citations

to the record, with quotations from Mr. Novak, stating that he admits, "Yes, we admit"--"I admit that there's ground water in the area, there's shallow ground water in the area of the mine," I mean, almost in those words. Again, I don't have the record in front of me-- I would cite you to our post-hearing brief and to those citations. It's pretty clear to us that that's what he said.

MS. DOUGHTY: Anything else?

Okay. Steven.

MR. SIMPSON: You indicated that in the company's application it claimed that there were seeps and springs. But, apparently, those seeps and springs were never located. And, in fact, Elliot Lips apparently indicates that he found no indication of water. Can you explain that?

MR. DUBUC: Mr. Lips--this--when you start talking about someone's--a company leasing the land, whether you can or cannot go on to that site, in other words whether you're trespassing or not becomes a question. The company is entitled to the possession of that land for the purposes that it leased it. And Mr. Lips, although he went around the circumference of that lease, did not go and conduct a detailed survey of the mine site,

because that's simply not allowed.

MR. SIMPSON: So, are you telling us that Living--or that U.S. Oil--or U.S.--that the lessee excluded Mr. Lips from the mine site?

MR. DUBUC: Did not ask permission.

MR. SIMPSON: Never asked permission.

MR. DUBUC: He did not, no.

Now, I would refer you to Figure 7 in the company's application. And a lot of that information comes from USGS surveys. And it specifically delineates the seeps and springs in the area of the mine. So, the mine at the map site--excuse me. It's a map of the mine site. And it actually lays out where those seeps and springs are located. Figure 7, it comes from the notice of intent to mine, the mining permit that the company submitted to the Division of Oil, Gas & Mining.

MR. SIMPSON: So, I'm curious. If the seeps and springs were noted, why weren't they discovered during the investigation?

MR. DUBUC: I think the answer to that question is, depends on when you look. So, for instance, we all know that water years vary from year to year. Last water year, we had floods.

This water year, everything's dry. And it kind of also depends on when you look. So, if you go out there and look in the middle of August, chances of finding a flowing seep or spring are substantially lower than if you go out there after the snow has melted and after those saturated zones have recharged.

If you look at when the company drilled and if you look at when the DWQ made its site visits--specifically the end of June--you have to wonder whether they looked at the right time. Our point is that you need to do a more comprehensive seep and spring survey and you need to look at different times of the year in order to find that water.

MR. SIMPSON: Now, Mr. Park indicated--Gerald Park indicated that he had over seven years of experience in that particular area, but he didn't note any seeps or springs.

MR. DUBUC: That was his testimony.

MS. FREY: I want to go back to the definition issue you brought up. You have--specifically ask if--you reference that particular definition, so make sure I understand what you're saying. This kind of troubled me that

you brought in USGS definition of ground water to augment what we--in our rules, but you also said sometimes why they're so vague, as you pointed out. What are you saying is different as a result of incorporating the USGS definition? Is it strictly the amount of water that would trigger? How does that play out in terms of the decision?

MR. DUBUC: Okay. So, the USGS definition--someone asked the question earlier about whether it had to be a flowing--I think he used--let me see--free-flowing water. We're talking about a zone of saturation. What is required is that the area that the water is in is fully saturated so there's no air particles.

Leland's example of pouring a gallon of water on the ground and letting it soak in, the area that soaks into is, by definition, by DWQ regulation definition, called the vadose zone. And that's a mixture of air and water. According to DWQ's interpretation of its regulations, that zone is not entitled to protection. It's not until that water seeps down and accumulates in an area of saturation, a zone of saturation, that the water is protected. And so that water doesn't necessarily have to be flowing. In fact, at certain times of

the year, the water may be sitting there. Until it recharges in the spring and a sufficient amount of water can manifest itself on the surface, nobody would even know that water is there.

I understand what you're saying about the lack of clarity in terms of the definition. And I think that, you know, as we deal with different mines out in this area of the State, we really do need to fix that problem, because it's quite clear, based on the testimony and based on the evidence in the record, that nobody's quite sure how much water it takes to qualify for protection. So, our point is that the default has to be the statute. And the statute says all accumulations of water. And "all" means "all." You know, if it's the size of this table, it needs to be protected.

MS. DOUGHTY: Other questions?

Greg.

MR. ROWLEY: Kind of the same thing. One follow-up question. I think your witness talked about what a seep or a spring was and defined one as a seep as less than a gallon a minute or a spring greater than that, and yet you're saying moist soil would have qualified. Why

the difference between your witnesses' definition and yours?

MR. DUBUC: All I'm saying is that there are--there's ground water all over the State that doesn't manifest itself on the surface. We probably don't even know about. It doesn't have to be flowing on the surface. It doesn't have to manifest itself in the form of a seep or spring in order to qualify--

MR. ROWLEY: But it has to be free-draining. Does that equal saturation?

MR. DUBUC: Saturation is a lack of air. It's a fully saturated zone. It doesn't have to be free-draining. It could be sitting there. It just depends on the geological formation that you're talking about.

Now, if you have a zone of saturation that is full of water but it doesn't have an opportunity to manifest itself on the surface and then the snow melts and it overflows just like it overflows a bucket, then you would see it in the form of a seep or spring. But just because it's sitting there and not showing itself in the form of a seep or spring doesn't mean that it's not qualified for protection.

MR. ROWLEY: It is perched at that point.

MR. DUBUC: It is perched.

MR. ROWLEY: But I'm just trying to get at the flow rate that was used for a definition for a seep or spring.

MR. DUBUC: Mr. Lips was using that as an example. And specifically, he was using it as an example to refute DWQ's claim it had to be a usable amount of water. And his point was is that if it flows a gallon a minute, it adds up. And within a hour, you're filling a 55-gallon drum, that's a useful amount of water. So, I think he was using that as an example of--to sort of refute the claims by DWQ.

MR. ROWLEY: My second question has to do with saturations, that of the tailings. I think when they put in their amended application, they were going to do some additional treatment of the tailings. I assume that had to do with making sure that they weren't free-draining. Do you have any reason to believe that they're going to be free-draining, any additional evidence that that would still be an issue?

MR. DUBUC: Unfortunately, much of the

information related to the tailings has been withheld by the company as a way for protecting what it terms proprietary wells. And so we do not have ready access to that information. And we have not had an opportunity to run our own series of tests on that material. And so I honestly can't answer that question. Perhaps it's not an issue.

MR. ROWLEY: You could have a re-opener in there if it is free-draining, permit is re-looked at.

MR. DUBUC: I'm not sure that's quite the qualification that would kick it into a re-opener. I think it has to be a bit more substantial than that. If you read the re-opener provision in the rules, it has to be a significant change in order to qualify.

MS. DOUGHTY: Amanda, go ahead, and then Darrell.

MS. SMITH: So, I have a couple of questions for you. And I guess it somewhat hinges around what's de minimis. And I'd be curious to know what your thoughts are on what you would define as de minimis, but I want to ask foundation first--

MR. DUBUC: Sure.

MS. SMITH: --before you answer. The other issue is that you keep in your testimony throwing around the word "protection," that any amount of water in the State deserves protection. And--but this isn't really what we're talking about. What we're talking about is keeping this for a permit-by-rule to a permit which would then require monitoring. So, one of the key hinging points here is that what we're saying--and what I have to agree to--I've looked at the NOI, the original NOI, and there isn't--there's water that--there's springs known in the area, but even that, they're not finding water in my reading of it.

So, what I'm asking is, if you kick it to a full-blown permit requiring monitoring, how would you do that at the site? Is there a practical way or a path forward if you get there? Because we--I mean, I would say that a permit-by-rule is protective in a realistic way of the specifics of the site. So, what would your reaction be to that?

MR. DUBUC: Well, one of the reasons that we asked for--that the company be required to submit a permit, one is that there be a more

comprehensive survey of the seeps and springs in the area in order to define ground water.

MS. SMITH: I'm sorry. I just have to interrupt. In all the testimony and the maps we've seen, what would be comprehensive enough?

MR. DUBUC: A seeps and springs survey that is conducted over an extended period of time and takes into account the variation of the water year. In other words, not something that--you don't go out in the end of June and say, "There's no water here. We're good." They have to go out at different times in the year in order to sample these areas. Now, the USGS has identified where those seeps and springs are located.

So, to answer your question regarding monitoring, there are very inexpensive ways of determining whether there--you know, whether that water is flowing and whether the--that water is going to be impacted by this mining operation. But unless DWQ actually conducts that monitoring, we'll never know. And that is our point, is that what we're asking for is a more rigorous oversight of this mine.

Now, at the end of the day, who knows what the results of that monitoring will be? But

unless we at least take that step, we will never know the answer to that question. And we are asking DWQ to take that step.

In terms of your question regarding de minimis, I guess that's a fluid concept. And I recognize that there is a certain amount of discretion that the executive secretary has in order to make--in order to determine what that means. I think that is something that each of us might answer in a different way. And so I'm not sure exactly how to answer that question.

My point that I was trying to make is that this is the first of its kind and we should be conservative in how we approach this. And if anything should--if any mining operation should require continuous oversight in order to ensure that that de minimis ruling was correct, this is it. And the way it's currently configured, that's not going to happen.

MS. DOUGHTY: Darrell, did you have a question?

MR. MENSEL: Amanda asked exactly the question I was going to ask.

MR. SIMPSON: Relative to the seeps and spring survey, you used the term "over a period of

time" and "extended period of time." And I'd like to know what that means. Are you talking about one water year, or are you talking about five water years? What is an extended period of time or a period of time?

MR. DUBUC: Well, let me answer that by making an analogy to something that's gone on in Willard Spur. They are conducting a multi-year study on the impacts to Willard Spur. One of the things that's happening over the last few years, and actually has been, I think, beneficial to conducting that study is that we had one year where we had more water than anyone knew what to do with, and this year, it's a bathtub out there. And that gives us those extremes that we're able to then use that data and determine what normal is.

So, the answer to your question depends on the situation and what occurs. We can't predict what the water year is going to be. We can't predict how much snow we're going to get. And I think that is--that becomes a judgment call that has to be made by DWQ as it occurs. So, that would be my answer to that question.

MR. SIMPSON: Isn't that generally built into the permit-by-rule designation where water

quality will continue to monitor, and if there is, for example, a heavy water year and it appears that there--or that seeps and springs do appear, that this could then be converted to a--to requiring a discharge permit?

MR. DUBUC: There is no monitoring required in permit-by-rule. It's self-monitoring by the company. And what we're saying is that we would be more comfortable having the State agency oversee this operation rather than depending on the company to self-report evidence of seeps and springs.

MR. SIMPSON: I believe that Water Quality has indicated that it will continue to monitor--and if there is a change, that the permit-by-rule designation could be altered.

MR. DUBUC: We have not seen any specific proposal. And there's no requirement in the law to monitor based on the permit-by-rule.

MR. SIMPSON: Thank you.

MS. DOUGHTY: Any other questions?

Leland.

MR. MYERS: I just--I don't know if it's really applicable. But you mentioned the difference between overseeing self-monitoring and

self-monitoring, and when in fact under the law those pretty much the same. When I have to monitor, I have to follow the rules as to how--what testing procedure we use, what kind of laboratory I'm able to use to do that monitoring, whether it's self-monitoring or overseeing self-monitoring, I don't see a differentiation of that. Could you explain, if there is one?

UNIDENTIFIED SPEAKER: Demonstration--

MS. DOUGHTY: No.

MR. DUBUC: When I drive down the highway and the speed limit's 65 and there's a police car in the left-hand lane, chances of me going 75 or 80 are pretty low. If there's not a police car in the left-hand lane, the traffic seems to be more free-flowing. I think that's just human nature. If someone is looking over our shoulder, we tend to act differently than if they're not. And that would be my answer to that question.

MR. MYERS: When they are looking over your shoulder as you do it, yeah. That's like a policeman is there when I'm driving, so he sees me. But DWQ rarely sees any self-monitoring performed. So, I don't see the difference, assuming adequate monitoring is actually taking place.

MR. DUBUC: That is the assumption.

MS. DOUGHTY: Okay. Any other questions?

MR. ROWLEY: I have a question not for the witness. But are we going to be able to get feedback from DWQ as to their interpretation of what it takes to reopen a permit in a case of tailings or in the case of water that shows up at a later date? How does that work?

MS. McEWAN: It needs to be in the record. So, if something was asked in the record and they can point to it, then . . .

MR. ROWLEY: So, who do I ask? In the audience, or how do we go about getting that on the record?

MS. McEWAN: That's what I mean. We're not adding to the record, so we'll have to point to something that's already in there. You could ask Mr. McConkie afterward. You may want to just make a note of that and get--after the next presentation. And then we can try to find a way to work through that. But you just can't add evidence.

MR. ROWLEY: Okay.

MS. DOUGHTY: Any last questions for Mr. Dubuc?

Thank you.

MR. DUBUC: Thank you for your time.

THE COURT: Mr. Hogle for U.S. Oil Sands.

MR. HOGLE: Is it okay to proceed?

MS. DOUGHTY: Yes, go ahead. I'm sorry.

MR. HOGLE: No, that's okay. I wanted to make sure we were all set.

Madam Chair, members of the Board, I'm Chris Hogle on behalf of U.S. Oil Sands. And U.S. Oil Sands appreciates this opportunity for me to speak in support of all the hard work the ALJ did in this case in the recommended decision. And U.S. Oil Sands urges the Board to approve and adopt the recommended decision in its entirety. Mr. Dubuc was correct, there are two issues. Stated simply, was there shallow ground water, and if so, will the operation--the proposed mining operation impact it beyond de minimis level.

Like many cases, this case turns on the burden of proof. And Living Rivers stipulate in a joint prehearing statement and order that Living Rivers bore the burden of proof. So, Living Rivers had to present evidence of shallow ground water.

Living Rivers had to present evidence of an impact on the shallow ground water beyond a de minimis level. Living Rivers had to show a lack of substantial evidence to support the executive secretary's factual determinations regarding a lack of shallow--absence of shallow ground water and more than a de minimis impact to that shallow ground water. And Living Rivers simply didn't satisfy its burden of proof.

Now, the ALJ did an excellent job of parsing through all the evidence. The ALJ did an excellent job at overseeing the presentation of evidence. We had two full days of live witness testimony and presentation and explanation of exhibits. And she did not exclude anything that Living Rivers sought to add, nothing. Living Rivers was not denied any access to any information. Living Rivers asked the ALJ to conduct a prehearing deposition of a witness. And they were allowed to do that. Living Rivers never asked to see any information beyond that which was provided to them.

The ALJ's recommended decision does a good job of outlining all the evidence of the absence of shallow ground water. Mr. Dubuc says,

Well, they only looked once at the end of June. Well, that's just not true. Mr. Parks--Gerald Parks, who is a licensed professional geologist, has been to the site repeatedly since 2005 during every month of the year except for January--every month of the year. And he's traipsed around mine site. And he's looked for evidence of shallow ground water. And he's looked to find it. He's not looked to not find it. He looked to find it, because they needed it. U.S. Oil Sands needs water for its operations. And he didn't find it. He didn't find it. There's none. The 2011 drilling program was done during one of the wettest years on record. And he found none.

And maybe Mr. Novak--Mr. Tucker, you're absolutely correct. Mr. Novak, all he said was--and I looked at every single page Living Rivers signed with regard to Mr. Novak's testimony. And what he said was--is that, No. 1, he could rule out monitorable quantities of ground water, but he could not rule out quantities of ground water smaller than that. But you know who could? Rob Herbert did. He ruled it out on page 104 of the transcript. Bob Bayer--Robert Bayer did. He ruled it out in his sworn testimony. Gerald Parks did.

That's substantial evidence. And Living Rivers has nothing, nothing to indicate that there's shallow ground water in the mine site.

What did they show? What did they have? Well, they had snippets in U.S. Oil Sands' submissions to the agency in its permit-by-rule application--or demonstration, snippets that say there are nearby seeps and springs in the area--in the general area. Well, those nearby seeps and springs were plotted. This is Figure 7. This is the figure that Mr. Dubuc referred to this morning. This is Figure 7. Now, these blue dots down here (indicating) represent USGS mapped springs. And the evidence was undisputed that those springs are hydrologically disconnected from the project site. They're not going to get impacted.

Now--so, the other thing that Living Rivers identified was a water right application for this blue dot right there (indicating). There was a water right application for that. It was rejected. There's an exhibit in the record, an official rejection notice from the State engineer. It was rejected. It wasn't rejected for some administrative reason. It was rejected due to physical impossibility, meaning there's no water.

So, Living Rivers' case boiled down to these four little green dots (indicating). That's what their whole case boiled down to.

They--those are labeled--yes, those are labeled as seeps. But there are seeps and then there are seeps. The evidence--the testimony came in that there are some seeps that do not represent ground water, including Elliot Lips, Living Rivers' own expert. His testimony was these seeps may not represent shallow ground water. And Mr. Lips went to the project site. He didn't say that he was limited to the circumference of the project site. He didn't say that. He said he went to the project site. And he did not report any finding of evidence of shallow ground water. And you got--I mean, you got to think if he found it he would have said something. Okay. All right.

There was one witness in this case who had personal knowledge about what those four green dots actually represent. And that witness was Gerald Park. Gerald Park-- this is Exhibit 314--Gerald Park drew this diagram to represent what those four green dots really mean. And what he said was, is that they're not related in any way, shape, or form to ground water; what they're

related to is runoff from precipitation events.

So, this would reflect (indicating) the top of the hill where the mine will be. This is a core hole (indicating), 1401. It's an exemplar core hole that--one of the 55 that U.S. Oil Sands drilled in the project area. This would be the hillside (indicating) where those seeps--quote/unquote, seeps were located. And what he's saying is that as the snow melt--as the snow melt happens, rain happens, it comes downhill--this is a talus area (indicating), or a collection of loose gravel. It builds up in basically a puddle on top of the oil sand bed. And it just puddles up there. And then at some time after the storm happens, they're gone. They're gone.

So, this is the personal knowledge regarding what those green dots really mean. It's not a theory. Living Rivers tries to dismiss it as just a theory. Gerald Park's--Park testified that it's not a theory, it is personal knowledge based on seeing, touching, feeling. He sunk a pickax into those gravelly areas. That's their case. They didn't satisfy their burden of proof.

Now, impact. This is a good project that U.S. Oil Sands wants to do. And it's been in

the planning--in the permitting process since 2005. And, I mean, we're not blaming the agency. The agency's done a great job. But they want to get started. And this is a good project. And it deserves to get started. Their project will be best in class at recovering 96 percent of the bitumen of oil sands, 96 percent.

The only additive that U.S. Oil Sands will introduce that's not already out there in the native area, the only thing that they're going to add to separate the bitumen from the sands is d-limonene. And d-limonene is a naturally occurring citrus product made out of orange peels. And according to Living Rivers' own exhibit, Exhibit 204--it's an EPA publication--it's safe. It's generally regarded as safe in food. It's been tested to be safe on mammals.

And the other thing about d-limonene is it evaporates or volatilizes quickly. It biodegrades. It volatilizes quickly. U.S. Oil Sands's project is proven to recover 99 percent of the d-limonene that they'll add--99 percent. So, what will be left over that goes into the disposal areas is just a minor trace amount.

And it--what Oil Sands is--U.S. Oil

Sands is going to do is mechanically mix the fines and the sands and use robust drying mechanisms so that there's going to be little chance, if any, that the d-limonene won't evaporate. It's going to evaporate on this high plateau, windswept area. There's going to be de minimis impact, if any.

There was some questions about the definition. And I want to address the definition. U.S. Oil Sands contends that the ALJ in this case used an improper definition of ground water. But the definition of ground water that the ALJ used was the definition of ground water in Utah law. If you look at Paragraph 16 on page 31 of her recommended decision, that's the definition that she's using. And she quotes, Ground water means subsurface water in the zone of saturation, including perched ground water. That's Utah law.

Now, what Living Rivers says is that, no, she should have used the waters of the State definition. Waters of the State means all streams, lakes, ponds, etc., and all other bodies or accumulations of water, surface and underground. So, they're saying the ground water--the definition should be that instead of ground water in your regulations. Well, that argument--this is not the

time and place for that argument. That's a rulemaking argument. And that argument would really throw a monkey wrench into what this agency is doing. Rob Herbert testified that he's supervising 41 ground water discharge permits right now. And if we go and change the ground water definitions under Utah law now, that's really going to throw a monkey wrench into things.

But, in any event, the ground water definition and the waters of the State definition--there's no conflict there. The waters of the State definition uses the word "accumulations of waters, surface and underground," "accumulations." Well, based on the science of ground water, accumulations of underground water and water in the zone of saturation, it's the same thing. They're one and the same. It can't be any other way under the science of ground water.

Now, below that--and I'm going to explain that. Below the waters of the State definition, I've got the USGS definition of zone of saturation. Now, the ALJ did not use a USGS definition to supplant the ground water definition. She did not do that. What she did is she filled in the gap here that--you'll see the ground water

definition says zone of saturation. Well, we looked hard in the regs and the State law for a definition of zone of saturation. Unfortunately, we didn't find one. So, we went to an authoritative source, the United States Geological Survey. And what they say is that the zone of saturation means the zone in which the functional permeable rocks are saturated with water under hydrostatic pressure. Water in the zone of saturation will flow into a well and is called ground water. Zone of saturation where the--basically the pore space is saturated with water under hydrostatic pressure.

Well, guess what? That's the same as an aquifer under the definition provided in State law. Aquifer is a geologic formation that contains sufficiently saturated permeable material. It's the same thing. Zone of saturation is the same thing as an aquifer. And an accumulation within the waters of the State definition can't mean anything else. And you know who said that? Elliot Lips said that. Mr. Lips, Living Rivers' expert, testified--in describing how precipitation becomes ground water, he testified you'd start to accumulate water in the pore spaces. It's going to saturate the pore space. That's what Mr. Lips

said. And he went on to say this zone where the ground water occurs is an aquifer. There's no conflict. The ALJ used the correct definition. There's no need to--she used the correct definition based on Utah law and the science of ground water.

Thank you very much.

MS. DOUGHTY: Thank you.

Questions for Mr. Hogle?

MS. FREY: I have a question on that last point. You're saying--I think what I heard you say is that USGS definition and the definition of the aquifer are the same. Was that part of your point there at the end?

MR. HOGLE: The USGS definition--we only use that to define the zone of saturation. The zone of saturation, according to the USGS, is the same. Essentially it's the same as the Utah State definition of aquifer.

MS. FREY: Except towards the last part of our definition of aquifer, which is usable quantities of water, that is the question. They're not the same. They're similar, but they're not the same.

MR. HOGLE: Only because the word "usable" isn't in the USGS definition. But the

USGS definition does say it has to be under hydrostatic pressure and water in this zone of saturation will flow into a well.

MS. FREY: Right.

MR. HOGLE: Rob Herbert testified that that's why he said ground water is in an aquifer and it has to be usable. That's why he said that. And you know who else said that? Mr. Lips. There's really no dispute in this case that ground water is water in an aquifer.

MS. DOUGHTY: Other questions?

Darrell.

MR. MENSEL: Yeah. As I understand it, the water that you use for processing in this comes from some deep wells that you've established in the deep aquifer, which is isolated supposedly from the impacts of the mine itself. Is that correct?

MR. HOGLE: That's correct. We drilled five holes to find the ground water. Each one was drilled over 1,500 feet below depth. Four were dry, bone dry. We found one--the fifth one, we encountered water for the first time at over 1,800 feet. And that's what you want to know.

MR. MENSEL: And how much water is involved in this processing?

MR. HOGLE: It's estimated to be 4,000 barrels per day, give or take.

MR. MENSEL: Okay. I guess one of my concerns is--and doesn't really get talked about much by the scientists--is that the mine pit is going to be dug to a depth that penetrates a formation which, according to Elliot Lips, is the zone of permeability in that area in which--so you're bringing up water from a mine--your mining water, I think, from--as far as I can tell. Then you're bringing up and using it and putting it into a pit, which has penetrated a permeable formation.

In other words, it seemed to me that you're actually changing the hydrology of the area. And that may not be so big of a deal on 70 acres, but you guys are planning a 6,000-acre operation. And that's just the marginal developments. You know, I don't see how you can just simply say that this is all down the road and so on, so forth, something we can just look away from.

MR. HOGLE: Well, here's a good--this is Exhibit 314 again. We are taking out some of the impermeable layers, but we're not taking them all out. We are not going to mine the lowermost oil sand beds, which will form a permeable layer that

will protect whatever is beneath there. But there's nothing beneath there until over 1,500 feet.

So--and this is a 213-acre project right now. U.S. Oil Sands wants to establish a proven track record with this and then take the same proven track record and move on. If they don't move it right under the ongoing supervision and monitoring, if they don't prove it, then they have to come in for a ground water discharge permit and they will have to conclude their process. So--I mean, right now before you is just this 213-acre project, not 3,000 acres or anything else.

MR. MENSEL: Uh-huh (affirmative). I guess this is--maybe it's off the point. But, you know, if this is a demonstration project, I don't understand why your company didn't just ask the State of Utah to monitor the thing. You know, because then you got proof and then you can go out to the people and say, Hey, we've asked the State to look at it. They got people out there. We got a permit. We're doing--you guys would have already been digging in the ground by now.

MR. HOGLE: Well, actually, that's going to happen, because we're not only dealing with DWQ,

but we're also dealing with DOGM. And DOGM has a reclamation plan that requires us--and put in place. And there's going to be monitoring by the DOGM folks in connection with the implementation of that reclamation plan.

MR. MENSEL: Is it water monitoring? Is water monitoring going to be part of it?

MR. HOGLE: It's whatever they want it to be. The rules--the DOGM rules don't limit it to any kind of specific type of monitoring.

MR. MENSEL: Well, that's helpful, but I'm not sure I completely trust DOGM.

MS. DOUGHTY: Steven.

MR. SIMPSON: I think Darrell raises the issue of the re-opener. Can you help us understand how this permit-by-rule permit could be reopened and what would be the trigger for that?

MR. HOGLE: Sure. Well, we--U.S. Oil Sands wants to be a good partner with the State and with DWQ. And so what they've done is they've committed to do the things--some of the things they've already done and some things they're going to do. So, in the 2008 demonstration, the submission that U.S. Oil Sands made to the agency, they said, Here's all the information that we have.

And we're going to do this intensive--the drilling program. And we're going to share those results with you. And they did.

And because the testing hasn't been done on actual tailings, Mark Novak asked U.S. Oil Sands, once they're up and running, to go ahead and please do that and share the results with us. And they're going to do that. There hasn't been any request that's been denied. And U.S. Oil Sands--like I said, they want to be a good partner with DWQ. And so they'll do whatever is reasonably required. They'll do whatever is asked of them to demonstrate that this is a good project.

MR. SIMPSON: Is there any stipulation between U.S. Oil Sands and Water Quality relative to what U.S. Oil Sands will do?

MR. HOGLE: Well, there's not like a formal stipulation. But the company representative testified under oath during the evidentiary hearing that he was willing to do the further testing that the Division wanted to do. And maybe there can be. But for purposes of this proceeding, I think that we're entitled to go forward. And in terms of the monitoring--like I said, you know, every indication is that the folks have worked well with one

another. We've worked well with Mr. Novak. And we'll continue to do so.

MR. SIMPSON: Thank you.

MS. DOUGHTY: Question?

MR. ROWLEY: Two questions. Again, kind of coming back to the tailings and whether or not they're saturated or not, I know we changed their permit or they changed their permit. Was that done to address concerns about tailings themselves being saturated? I know they're running it through a screen, a press, or--

MR. HOGLE: Actually, it wasn't--actually, the process was changed to recover more water. Water's scarce. And so they need to recycle as much water as they can. And that's the reason. It just so happened that using those extra robust mechanisms, it makes it even more safe, but we think it was safe before.

MR. ROWLEY: That wasn't done to reduce the saturation point.

MR. HOGLE: No.

MR. ROWLEY: What about the Po2 question? I think it's a good one--you need to put in a small plastic pipe to monitor for ground water rather than just taking a look for water on the

surface. Are you going to do that, or are you willing to do that?

MR. HOGLE: Well--I mean, they've done--Rob Herbert testified that what U.S. Oil Sands has done to look for water is extraordinary, it's beyond anything he's ever seen. And so we think we've done enough. Putting PVC into the ground with holes. First of all, there has to be water there. Where do we put it? We've looked--everywhere we've looked since 2005 for water, everywhere we've looked--and we can't be faulted for not looking enough--everywhere we've looked we see none.

MR. ROWLEY: I understand that. I just know when we worked with the Corps of Engineers--they come in and they pick out a plot there and put in Po2 and then you monitor it. And that can be done while the mine's in operation, so keep the mine in operation, too.

MR. HOGLE: You know, that may be something that we could talk about in this ongoing supervision process.

MS. DOUGHTY: Other questions or comments?

MR. BUNKER: You ready for our motion?

MS. DOUGHTY: So, no other questions for Mr. Hogle.

Mr. Rowley.

MR. ROWLEY: I have a question after that, the general question I asked earlier about re-opening this and stuff.

MS. DOUGHTY: Darrell.

MR. MENSEL: I just wanted to point out one other thing. I agree with your comments that d-limonene has been determined to be safe. That's--from what I can read, it's a citrus-based product and it's fairly safe. But the point that was made in William Johnson's testimony. And I think it's something that has to be stated--and you didn't state it--and that is that the problem with d-limonene is that it makes--it adds mobility to carcinogenic hydrocarbons which are currently locked up in the oil formations themselves, and that to me is the real--if you're talking about a pollution issue, that's the real issue. So, people need to know that. It's not about--not really about d-limonene. It's about something else.

MR. HOGLE: Okay. But what Mr. Johnson didn't take into account was the fact that what U.S. Oil Sands was going to do. I mean, they're

going to--they got a whole robust process that uses the d-limonene to mobilize and extract from the sand every last molecule that can possibly be extracted. So, they're going to use, you know, anything humanly possible to get that bitumen out of the sand before it goes back into a disposal area and Mr. Johnson--Doctor-- Professor Johnson, with all due respect--he did not take that into account. He also assumed that the residual materials would be saturated. And he didn't do anything to study that. And I think as the record demonstrates, these are not going to be saturated conditions.

MS. DOUGHTY: Thank you.

MR. SIMPSON: The recovery rate, I think I read somewhere in the record that it was in the 90 percent--

MR. HOGLE: Ninety-six percent. Yeah.

MS. DOUGHTY: Thank you, Mr. Hogle.

Discussions here within the Board?

And I know, Greg, you have a point that you'd like to bring up again. We're going to ask--

MR. ROWLEY: However, we can go back to the Division and find out whether or not if they do find these tailings are saturated, does that reopen

it? If they do find ground water in the course of mining, does that reopen it?

MS. DOUGHTY: Go ahead, Leland.

MR. MYERS: According to our Counsel, we have to find a connection for that question to--so, in Rob Herbert's testimony, which is admitted as document No. whatever--100, 101, something like that; I can find that number if you want--Rob Herbert mentions that if DWQ becomes aware of information indicating that the U.S. Oil Sands PR Springs project is causing ground water degradation or interfering with beneficial uses of ground water, the executive secretary will require the company to submit an application.

So, in that, it states that they would do that. And I'm assuming that that would mean there would be some methodology to--and this would be the question back to the State--to the Division, what would be the methodology to make that assessment that something was going on? Would it be additional sampling that DWQ was doing in the area? Would it be sampling that is being requested from PR Springs, the U.S.--U.S. whatever it was--Oil Sands? What would be the methodology to answer how you would become aware of that?

MR. McCONKIE: I'm just going to add Rob Herbert to address--

MS. DOUGHTY: Probably take the microphone, please, so people can hear.

MR. HERBERT: Well, as I stated in my testimony, the Division of Oil, Gas & Mining is required to conduct best management practices. Those are specified in the DOGM mining permit. So, those would be the mechanisms for determining if there's a problem from the results of the best management practices.

MR. MYERS: Do you consult with DOGM to help them understand what sampling would be necessary in order to meet those best management practices?

MR. HERBERT: Yes.

MR. MYERS: So, sampling could be done through DOGM's requirement that would meet the requirements of the Division of Water Quality to assess the water quality circumstances?

MR. HERBERT: That's correct.

MR. ROWLEY: As part of the agreement already, they've agreed to leaching tests as soon as they start to have actual tailings. Is that correct?

MR. HERBERT: Who is who? The company has agreed to do additional leachability tests, not DOGM.

MR. ROWLEY: Okay.

MS. DOUGHTY: Any other questions or comments or discussions?

MS. FREY: I have a comment and a discussion on the Board. I'm stuck still on this definition question. I'm looking at page 27, the ALJ's--I'm not going to read the whole thing. You know what I'm talking about, the recommendation.

UNIDENTIFIED SPEAKER: Get closer to the mike.

MS. FREY: I'm short.

MS. DOUGHTY: On page 27.

MS. FREY: On page 27, she writes kind of a summary of--she says that Living Rivers is arguing and that the executive secretary acted contrary to law by not requiring the ground water discharge permit to protect all water regardless of quantity and that that is not supported by law, she says. And she lays out first our definition of ground water. And then she calls back in this USGS definition of water--of underground--zone of saturation. And then she says that this is--the

drilling program illustrates the absence of the zone of saturation. So, ground water, zone of saturation, and drilling . . .

And so, to me, I am concerned that this includes our language change--something that is not part of our statute regulations, that this draws in kind of extra definition into that logic chain. So, I just wonder if anyone else on the Board--what other people's thoughts on the Board is about that.

MS. SMITH: I am--I will agree with you. And I don't know if we can get the slide back up. It's probably not important. But the Utah Code is actually more protective. So, I think that the ALJ, right or wrong, is portraying it broader than Utah Code, because the Utah Code says the wording you pointed out during--what is it?

MS. FREY: It's for aquifer, not for ground water. That doesn't fit in the chain. She starts with ground water.

MS. SMITH: She's talking about the zone of saturation, so I guess you have to make the leap that the zone of saturation is the same as aquifer, which--I Googled through this whole thing. And every site I found, they're the same. So, for me, I make that leap with her. But I think, like most

of our Utah statute, it's more restrictive than any Federal definitions.

MS. DOUGHTY: Go ahead, Leland.

MR. MYERS: I certainly agree with Rob. The definition of ground water probably could use some work, but I think that's separate from our decision here today. We as a Board could simply request staff to reconsider that rule to maybe make the definition better so that it would be well understood in a case like this. I would assume that's in our purview to do that so that we can improve what--the definition there. But using the given definitions that we've been given, we've been shown, and which are in the record, it seems to me that that leap of faith between zone of saturation and aquifer isn't that big of a leap.

Now, if we feel we need to be better defined, I think we should ask staff to do that. And in conjunction with that, I think that if we're conserved about the concept of de minimis, maybe we need to define what is de minimis so staff has a better handle on what constitutes de minimis. But given the general understanding of de minimis, I don't see for this case those being significant considerations.

MS. DOUGHTY: Greg.

MR. ROWLEY: Again, we're being asked whether or not we support administrative law judge's conclusions.

MS. DOUGHTY: Right.

MR. ROWLEY: And I have to concede partly that I had marked up close to where you were that she says, Fifth--it's on page 26--"Fifth, there is a re-opener in the 2008 decision that provides that if any ground water is discovered, a ground water permit may be required." And then talks about re-opener, and then goes on to say later in the paragraph same thing, ". . . if leachability tests after operations commence indicate that compounds may leach out of the tailings upon conduct with rain water." So, can I read into that that the administrative law judge's decision says that, yeah, there is re-openers there if the problems are discovered or if we find that tailings are saturated or ground water's impacted or ground water is on-site?

MS. McEWAN: Yeah, that's what she's saying. And you also have the laws and regulations.

MS. FREY: It says may, not shall.

THE REPORTER: Sorry. I can't hear you.

MS. DOUGHTY: Steven, do you have something else?

MR. SIMPSON: Yeah, I have a couple of comments. It was indicated in the ALJ's recommended decision--and the attorneys for U.S. Oil Sands referenced this, as well--Living Rivers has the--had the burden of showing that there was ground water and that there--initially there was ground water, and secondly, that there was impact. And I'm not sure that the evidence that we've seen indicates that there's any indication of ground water at all. There's some indication that there might be--and if we monitor it long enough, that we modify it some. But I don't see anything in the record that indicates at this point that there was--that ground water was--which was a concern for me.

UNIDENTIFIED SPEAKER: There's ground water in the area. If anybody wants to check out pictures--

MS. DOUGHTY: You've had your time, so . . .

MR. BUNKER: You ready for a . . .

MS. DOUGHTY: Yeah. You're ready for a motion. Does anybody have anything else before we make a motion? Is that what you want to do?

MR. BUNKER: Yeah, I'm going to--

MS. DOUGHTY: Any last comments or discussions that anybody would like to have before Clyde makes his motion?

MS. McEWAN: Do you want me to remind you again what your options are before you do that or--

MR. BUNKER: Yes.

MS. McEWAN: I said that a million times, but--

MR. BUNKER: I think that would be very appropriate.

MS. McEWAN: One more time. You can approve it in its entirety, meaning the whole memorandum, and recommend the order. You can approve it with modifications, but you'd need to tell what those modifications are specifically. You can disapprove it. Or you can remand it back to the ALJ for further proceedings, so . . .

MR. BUNKER: I will make a motion to accept it as it is.

MS. DOUGHTY: In its entirety?

MR. BUNKER: As--in its entirety.
MS. DOUGHTY: Okay. And a second?
MR. MYERS: (Raises hand.)
MS. DOUGHTY: All in favor say aye.
(Board members vote in the affirmative.)
MS. DOUGHTY: Can I see by hands just for the ayes, just to make sure that we have a majority?
(Board members raise their hands.)
MS. DOUGHTY: Nine in favor.
All opposed?
(Board members raise their hands.)
MS. DOUGHTY: Two opposed. And that's it.
MS. McEWAN: Can you read off the names, unless you got those, for, because I'll need to put that in the order. So, the ayes--
MS. DOUGHTY: Go through them and say whether or not--state your name and state whether or not you are an aye or nay when we go through the line.
MR. TUCKER: Jeff Tucker, aye.
MR. BUNKER: Clyde Bunker, yes.
MR. BATEMAN: Myron Bateman, yes.
MR. MYERS: Leland Myers, aye.

MR. SNARR: Dan Snarr, aye.

MS. DOUGHTY: Paula Doughty, aye.

MR. SIMPSON: Steve Simpson, aye.

MS. FREY: Merritt Frey, nay.

MR. MENSEL: Darrell Mensel, nay.

MR. PEACOCK: Neal Peacock, aye.

MR. ROWLEY: Greg Rowley, aye.

MS. DOUGHTY: Is there anything you'd like to say?

MS. McEWAN: I do--just to close up, that the order doesn't become final for purposes of doing a request for consideration or appeal until it is written, actually signed by the presiding officer, which in this case will be the chair. So, that task will go to me. And I will review the record and prepare that order. And then I will give it to the Chair for signature. So, once it goes out, that's when it becomes final.

MS. DOUGHTY: Thank you. And thank you for appropriately representing.

Okay. Next on the agenda, it's just actually the next meeting, which is scheduled for December 6.

MR. MYERS: Could I--

MS. DOUGHTY: Yeah, go ahead, Leland.

MR. MYERS: I would like to make a motion that we authorize staff--request staff to look at the ground water definition and the de minimis statute to make sure that we have it correct, and if it isn't, to make appropriate changes.

MS. FREY: I would second that.

MR. MENSEL: I would like to broaden that a little bit. I feel like part of the problem with voting today was the voting on a very specific thing. Everybody knows there's other elephants in the room that are not allowed to be discussed. But I think there really were some technical issues that were not addressed and were important to me. And I would like to at least have an opportunity to ask staff about that and get some kind of response, and maybe as part of this.

MR. MYERS: I can broaden my motion to include that, if you wish.

MS. DOUGHTY: Okay. Great. Thanks. All in favor.

(Board members vote unanimously in the affirmative.)

MS. DOUGHTY: Opposed.

(No voice was heard.)

(Proceedings concluded at 11:42 a.m.)